

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

SYLVIA LEEDS,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 6:09CV00061
)	
JOHN DOE ONE et al.,)	
)	
Defendants.)	
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**PENDUM LLC’S MEMORANDUM OF LAW IN OPPOSITION TO
THE KROGER CO.’S MOTION FOR LEAVE TO FILE A SURREPLY BRIEF**

COMES NOW Defendant Pendum LLC, by counsel, and, pursuant to Rule 7(b)(1) of the Federal Rules of Civil Procedure and Civil Rule 11(c) of the Local Rules of the United States District Court for the Western District of Virginia, submits this Memorandum of Law in Opposition to The Kroger Co.’s Motion for Leave to File a Surreply Brief [DE 35].

Statement of Facts

This action against Pendum LLC (“Pendum”), an ATM servicing company, and The Kroger Co. (“Kroger”), a supermarket chain, arose out of injuries that Plaintiff Sylvia Leeds (“Mrs. Leeds”) alleges to have sustained when a boxed patio umbrella fell on her while she was a customer at a Kroger store in Lynchburg, Virginia. (*See* Compl. ¶¶ 4–5 [DE 1].) In her Complaint, Mrs. Leeds alleges that the box fell on her because, first, an unidentified Kroger employee carelessly leaned the umbrella against an unsecure magazine rack and, then, an unidentified Pendum employee, in opening the door to an ATM, caused the door to strike the magazine rack, thereby causing the umbrella to fall onto Mrs. Leeds. (*Id.* ¶¶ 7–8.)

Shortly after the conclusion of the depositions of fact witnesses in this case, Mrs. Leeds’s counsel informed Pendum’s counsel, by telephone, that Mrs. Leeds intended to dismiss her

claims against Pendum because of a lack of evidence against Pendum. Pendum agreed to the dismissal. The parties, therefore, would have simply filed a notice of dismissal of Pendum under Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure; however, Kroger, by counsel, informed Mrs. Leeds and Pendum that it opposed Mrs. Leeds's decision not to sue Pendum and would, therefore, not sign the stipulation. Accordingly, Mrs. Leeds and Pendum filed a Joint Motion for Voluntary Dismissal under Rule 41(a)(2). (*See* Mot. Volun. Dismissal [DE 31].) Kroger, in turn, filed an opposition to Mrs. Leeds's and Pendum's Joint Motion, and Pendum timely filed a reply to Kroger's opposition. (*See* Kroger's Opp. Mot. Volun. Dismissal [DE 32]; Pendum's Reply Kroger's Opp. [DE 33].)

On May 12, 2010, Mrs. Leeds and Pendum filed a notice with the Court that the last brief on their Joint Motion, as permitted under the Local Rules and the Court's Pretrial Order, had been filed and that neither moving party requested a hearing on the motion. (*See* Pl.'s & Pendum's Joint Notice [DE 34].) In turn, Kroger has now moved the Court for leave to file a surreply brief—another memorandum of law on the issue of whether Mrs. Leeds must be forced, against her will, to prosecute a meritless lawsuit against Pendum. (*See* Kroger's Mot. Leave File Surreply Br. [DE 35].) Kroger's motion consists of a single sentence simply stating that Kroger requests leave to file a surreply. Kroger did not submit a brief with this motion for leave, and it did not include any argument or explanation of its need to file a surreply in the motion itself.

Argument

THE COURT SHOULD DENY KROGER'S MOTION FOR LEAVE TO FILE A SURREPLY.

The Court should deny Kroger's motion for leave to file a surreply because its motion does not state grounds on which to base an order granting leave and no brief accompanies the motion. *See* Fed. R. Civ. P. 7(b)(1)(B); Civil R. W.D. Va. 11(c)(1). This Court's Local Rules

require that, with certain inapplicable exceptions, all motions “must be accompanied by a written brief setting forth a concise statement of facts and supporting reasons, along with a citation of the authorities upon which the movant relies” unless the “motion itself contains the legal and factual argument necessary to support the motion.” Civil R. W.D. Va. 11(c)(1), (2). Furthermore, the Federal Rules of Civil Procedure require that all motions must “state with particularity the grounds for seeking the order.” Fed. R. Civ. P. 7(b)(1)(B). Kroger’s motion, however, does not state any grounds, does not contain any legal or factual argument, and includes no written brief. Accordingly, the Court should deny Kroger’s motion for leave to file a surreply. *See* Fed. R. Civ. P. 7(b)(1)(B); Civil R. W.D. Va. 11(c)(1).

Conclusion

For the foregoing reasons, the Court should deny Kroger’s motion to file a surreply.

Dated: May 13, 2010

Respectfully submitted,

PENDUM LLC

By counsel

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2010, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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